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IN THE

Supreme Court of the United States

October Term, 1968
No. 1317

POMONA VALLEY CENTER, INC., a California Corporation, *et al.*,

Petitioners,

vs.

COUNTY OF LOS ANGELES, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeal, Second Appellate District, Division Two.

BRIEF IN OPPOSITION.

Opinion Below.

Pursuant to its determination under Rule 976 of the California Rules of Court, the opinion of the California Court of Appeal, Second Appellate District, Division Two (hearing denied by the California Supreme Court) was not published.[1] However, it is printed in Appendix A of the Petition.

[1]Rule 976(b) provides that an opinion of a court of appeal shall be published only "if it involves a new and important issue of law, a change in an established principle of law or a matter of general public interest."

Jurisdiction.

The Petition invokes jurisdiction under 28 U.S.C. §1257(2) [pertaining to appeals, not certiorari] alleging that the property tax equalization hearing conducted by the Los Angeles County Board of Equalization, which was the trier of fact herein did not afford due process of law and equal protection of the laws to the petitioning taxpayers.

Questions Presented.

Petitioners allege that at the hearing before the Los Angeles County Board of Equalization they were denied due process because

a. the board was biased,

b. it followed an erroneous concept of law,

c. it excluded an alleged sales assessment-ratio study made during prior years from evidence,

d. it failed to require the county assessor to disclose certain tentative and privileged assessment-ratio studies made by the State Board of Equalization even though no request was made that such studies be disclosed, and

e. it failed to make formal findings of fact even though such findings were not requested by the petitioners.

Petitioners also contend that they were denied due process "by the appellate court in making the presumption of validity of the act of a public official conclusive." They do not further explain nor argue this point.

Statutes Involved.

Additional statutes involved herein are set forth in the appendix hereto.

Statement.

In this litigation ten petitioners contested the 1960 property tax assessments of their shopping centers before the Los Angeles County Board of Equalization. After a hearing[2] the board approved the assessments. The taxpayers then paid their taxes under protest and sued for refunds pursuant to California Revenue and Taxation Code §5138. Sitting in an appellate capacity, the superior court held that the taxpayers had not made a prima facie case of assessment discrimination before the board [C. T. p. 261, para. XII], that the board had given them a fair hearing [C. T. p. 260, para. VI], that the board had ruled correctly on objections to the reception of evidence [C. T. p. 259, para. IV] and had committed no error which was prejudicial to them [C. T. p. 260, paras. V, VIII, X, XI and XIV]. No question was raised in the superior court regarding the lack of findings of fact by the board.

The superior court entered judgment in favor of the County.

The taxpayers then appealed the case to the California Court of Appeal which rendered its opinion (Pet. App. A) in favor of the county. They then petitioned for a hearing before the California Supreme Court on the same grounds asserted herein. This was denied.

At the hearing before the board, as evidence of the value of their shopping centers the taxpayers introduced

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[2]Superior Court Exhibit 1 is the transcript of this hearing.

Exhibits A to K [Superior Court Ex. 3] which were computations of the estimated future rent to the lessor of each center capitalized at 10%. These exhibits are unsigned and nothing indicates the identity of the person who prepared them or whether he was a qualified appraiser; no reasons were given for the 10% capitalization rate selected.

The owner of the Reseda Plaza Shopping Center also testified to an opinion of its value but gave no reasons for his opinion nor did he disclose any qualifications as an appraiser. Likewise, the owner of the Atlantic Square Shopping Center testified that it had some of the finest chain store tenants in the United States [Ex. 1, p. 82] but had "never paid a cent of income to its owners for the first four years" and then it paid only 6%.

The taxpayers offered no evidence of the fraction of value at which assessments were made throughout the county—generally called the assessment ratio—except for the assessment ratio study made by a witness who was not qualified as an appraiser or as a statistician, who had verified less than ¼th of 1% of the sales upon which he relied, and who admitted that the sales prices did not reflect the actual cash value of the properties sold [Ex. 1, p. 115, lines 1-21].

The county rested without introducing any evidence.

The board made no express written findings of fact except that it approved the assessments of nine of the shopping centers and reduced the tenth one.

At the hearing before the board, the witnesses were sworn and the testimony was transcribed by certified court reporters. Exhibit 1 is the transcript of that hearing.

ARGUMENT.

1. The Challenged Presumption Is Not "Conclusive."

The only presumption regarding the validity of the act of a public official involved in this case is the presumption that public duty was properly performed and that the assessment therefore is correct. The California courts held that this presumption applied in this case because the taxpayers had not sustained their burden of showing the board that the assessor's figures were unfair or discriminating (Pet. App. A, p. 7). This obviously is not a "conclusive" presumption at all. It regulates the burden of proof. In 1960 it also constituted substantial evidence which could be weighed against other evidence, a rule which was abolished when California adopted Division 5 Chapter 3 Sections 600-668 of its Evidence Code in 1967 (Cal. Stats. 1965 ch. 299).

2. Findings of Fact Are Not Required or Needed When an Appellate Court Can Adequately Review a Case by Examining Its Record.

Prior to 1967 the appellate courts of California had always reviewed the decisions of local county boards of equalization by examining the record (reporter's transcript and exhibits) of the proceedings before the board.[3] In 1967 the California Legislature provided that written findings of fact should be made by a county board of equalization if requested by a party (California Revenue and Taxation Code §1605.5, Calif.

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[3] *Leach Corp. v. County of Los Angeles,* (1964) 22 Cal. App. 2d 624 at 637 (hearing denied by California Supreme Court), 39 Cal. Rptr. 654.

Stats. 1967 ch. 285). In the case at bar, the taxpayers made no such request. See the opinion of the Court of Appeal at pages 11-13 of Appendix A to the Petition.

3. The Board Did Not Follow an Erroneous Concept of Law as to the Methods of Showing Assessment Discrimination.

At page 9 the Petition alleges that the board believed that "the sole manner of showing inequality of assessment was by comparison of petitioners' property with allegedly similar property." It does not further argue the point. Both the superior court and the Court of Appeal found that this was not true (Pet. App. A, p. 5). We agree that this is not the *only* way to show assessment discrimination although it is a legally proper way to do so[4] and the way it is most frequently done. Nothing in the record indicates that the board was under the impression that this was the *only* way. Such evidence of discrimination, would, of course, have justified the board in granting relief to the taxpayers herein. Out of courtesy, the board members several times suggested that if they possessed such evidence they should introduce it (Pet. App. B, pp. 11, 18 and 21). These suggestions were made to dispel some rather strange ideas displayed by the taxpayers.[5]

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[4]*Birch v. County of Orange*, (1927) 88 Cal. App. 82 at 85, 262 Pac. 788 at 789 (hearing denied by California Supreme Court).

[5]One of the board members asked "Are you saying that two identical shopping centers, removed a mile, two miles from each other, that the same conditions surrounding them, well built, one has a good management, he gets the business, the other guy doesn't have a good management, he doesn't get the business—are you saying we should reduce the guy for his inability to attract or to produce a revenue?" To which the attorney for the taxpayers replied "That is exactly what we are saying." [Ex. 1, p. 73, line 25, to p. 74, line 9].

4. The Board Properly Excluded the Sales-Assessment Ratio Study Because It Lacked a Proper Foundation.

County boards of equalization are created by the California Constitution, Article XIII Section 9. They perform a judicial function.[6] They may act only on the basis of legal evidence.[7] The taxpayers argue (Pet. p. 18) that county boards of equalization "are not bound by technical rules of evidence", citing *Rancho Santa Margarita v. San Diego County,* (1933) 135 Cal. App. 434, 26 P. 2d 716. That case was, however, decided on the basis of a statute which has since been repealed—California Political Code §3676 which provided that "the board may . . . hear and take such evidence . . . as in its discretion it may deem proper." This discretionary power over the reception of evidence was revoked when Section 3676 was repealed in 1939 and replaced by California Revenue & Taxation Code §1609 which provided in its entirety that "On the hearing of the application, the county board may subpena witnesses and take evidence in relation to the inquiry" (California Stats. 1939 ch. 154). The Petition also cites *A. F. Gilmore Co. v. County of Los Angeles,* (1960) 86 Cal. App. 2d 471 at 476, 9 Cal. Rptr. 67 in which the statement was a mere dictum.

The sales-assessment ratio study offered by the taxpayers was excluded because no foundation was laid

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[6]*McClelland v. Board of Supervisors,* (1947) 30 Cal. 2d 124 at 129, 180 P. 2d 678, cert. den. 332 U.S. 823.

[7]*Universal Consolidated Oil Co. v. Byram,* (1944) 25 Cal. 2d 353 at 360, 153 P. 2d 746;

Leach Corp. v. County of Los Angeles, (1964) 228 Cal. App. 2d 634 at 637 and 641-646, 39 Cal. Rptr. 654 (hearing denied by California Supreme Court).

to show the qualifications, training or experience of the witness to appraise real estate or to make such a statistical study, because the witness didn't know the names of the parties to the sales, because he had not talked to any of the buyers or sellers, because he admitted that the sales prices did not reflect the actual cash values of the properties sold, because he had verified less than ¼th of 1% of his sales data with the brokers involved [Ex. 1, pp. 113, 115] and because the sales data included remote transactions "three and one half years before the 1960 tax lien date." *Leach Corp. v. County of Los Angeles, supra,* at 641.

5. The Taxpayers Made No Attempt to Put the Tentative, Unpublished State Board Ratio Study Into Evidence; Made No Offer of Proof Regarding It, and Never Requested the Board to Compel the Assessor to Disclose It.

So states the opinion of the Court of Appeal (Pet. App. A, p. 11). Furthermore, as the Petition admits at page 14, these tentative and unpublished studies have been held by the California courts to be privileged by statute and inadmissible in evidence until published. *Leach Corp. v. County of Los Angeles, supra.*[8]

The Petition repeatedly states that this tentative, unpublished State Board ratio study was in the possession of the assessor at the time of the board hearing (at pages 3, 14 and 20). The record discloses that, in fact, the assessor did not then possess this information [Ex. 1, p. 122].

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[8]A recent statute has withdrawn this privilege—California Revenue & Taxation Code §1605 as amended by Calif. Stats. 1966, p. 672 (First Extra Session).

6. The Record Shows No Member of the Board to Have Been Prejudiced Against the Taxpayers.

So found the superior court and the Court of Appeal (Pet. App. B, p. 5). Can anyone seriously contend that the matters quoted from the board's transcript at page 14 of Appendix B of the Petition display anything but good natured bantering? Is a board member guilty of bias because he complains of having been late to a night baseball game a year earlier? The board had complete power to adjourn those proceedings but instead it had worked late the year before to complete them—even at the expense of the first innings of an All Star Baseball Game.

The comments at pages 15-17 of the Appendix to the Petition arose from the taxpayers' attempt to introduce an affidavit and some comparison sales which, in violation of the board's rules, they had failed to submit to the assessor or to the county counsel in advance of the hearing [Ex. 1, p. 31, line 12, to p. 35, line 25]. They argued that they were excused from compliance with the rule because "it was the identical exhibit that was introduced last year" [Ex. 1, p. 31, lines 24-25; p. 32, lines 9-11]! The board merely urged them to obey the rule and explained the reason behind it.

The courts below found that the taxpayers "failed to establish a prima facie case of assessment discrimination" (Pet. App. A, p. 6). They offered no legal evidence of the countywide assessment ratio, and their market value evidence was, at best, highly questionable. It was based on values determined by capitalizing estimated future rents at 10% in the face of testimony from their own witness Udall [Ex. 1, p. 78],

owner of the Atlantic Square Shopping Center, that although it was occupied by some of the finest chain store tenants in the United States [Ex. 1, p. 82], it "never paid a cent of income to its owners for the first four years", and when it started to pay, it paid only 6%. Because the taxpayers did not make a prima facie case, the county rested without introducing any evidence. The board, which had tried hundreds of such cases annually, was fully aware of the discrepancies in the taxpayers' presentation. Many of the remarks of which they complain were simply sympathetic appeals to them to introduce any evidence they might possess which would entitle them to relief.

After he had concluded his case, one of the attorneys for the taxpayers, Mr. Potter, complained of the "technical rules" he had encountered and inferred that the board had been unfair (Pet. App. B, p. 21). The remarks quoted from the board at pages 21-23 of Appendix B of the Petition were in refutation of this charge.

The taxpayers also complain that their counsel was accused of "drumming up business". The expression was first used in a question by Supervisor Hahn [Ex. 1, p. 128, line 11]. The assessor promptly denied that he knew anything about that. Mr. Potter objected to the alleged charge [Ex. 1, p. 128, line 22] and forced Supervisors Hahn and Debs repeatedly to disclaim any charges that Mr. Potter was guilty of such unethical conduct (Pet. App. B, pp. 24-25).

We submit that the courts below correctly found that the taxpayers were granted a fair hearing (Pet. App. A, pp. 5 and 6).

7. Petitioners Misstate Other Aspects of California Law.

A.

At page 15 of the Petition, the taxpayers charge that "even the fact of a grossly excessive assessment does not of itself make the assessment invalid" and that the California taxpayer must also prove conscious fraud. Such a benighted rule actually did exist in this state until 1912.[9] It was never followed thereafter. The Petition cites a case which gave it lip service, a dictum which represented its dying gasp.[10]

As long ago as 1921, the California Supreme Court held that "A grossly inequitable and palpably excessive overvaluation of property for taxation may be constructively fraudulent."[11]

The conscious fraud rule has been entirely repudiated during the past twenty-five years. For instance, in *Simms v. County of Los Angeles,* (1950) 35 Cal. 2d 303 at 310, 217 P. 2d 936 at 941, the California Supreme Court holds that "It is not necessary for the plaintiffs to show actual fraud in cases of this nature."

B.

At page 15, the Petition also charges that "the California courts have accepted the mere opinion statement of the assessor as to the ratio of assessment without any substantiation as substantial evidence." It neglects to report that in the case cited this resulted because

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[9]*Los Angeles Gas & Elec. Co. v. County of Los Angeles,* (1912) 162 Cal. 164, 121 Pac. 384.

[10]*So. Calif. Telephone Co. v. County of Los Angeles,* (1941) 45 Cal. App. 2d 111, 113 P. 2d 773.

[11]*Birch v. County of Orange,* (1921) 186 Cal. 736 at 742, 200 Pac. 647 at 649.

the taxpayers themselves called the assessor as a witness and asked for his opinions without inquiring into either his qualifications or the factual data on which his conclusions were based. As the opinion says, "This necessarily amounted to a waiver" of such substantiation. *Leach Corp. v. County of Los Angeles,* (1964) 228 Cal. App. 2d 634 at 641, 39 Cal. Rptr. 654 (hearing denied by California Supreme Court).

In the case at bar, the assessor didn't even testify!

This is typical of the distorted statements the Petition makes about irrelevant aspects of California law in an attempt to support its argument that California taxpayers have no remedy against overassessments for property tax purposes.[12]

Conclusion.

We submit that the decision below was clearly correct. No important question of federal law is involved. There is no showing that California taxpayers lacked an adequate remedy for discriminatory overassessments either under the law as it was in 1960 or under the amended statutes now in effect. Hence we respectfully submit that there is no reason to grant the Petition herein.

A. R. EARLY,
Assistant County Counsel,
Attorney for Respondents.

Of Counsel:
JOHN D. MAHARG,
County Counsel.

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[12]See generally, Early, *Local Equalization Practice in California,* 4 Santa Clara Lawyer 147-165 (1964).